United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2104

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2104

BETTY LEVIN, ALLEGHANY CORPORATION
and ROBERT LeVASSEUR,

Plaintiffs-Appellees,

-against-

MISSISSIPPI RIVER CORPORATION,
MISSOURI PACIFIC RAILROAD COMPANY,
ROBERT H. CRAFT, T. C. DAVIS and
THOMAS F. MILBANK,

Defendants-Appellees,

MICHAEL MOUMOUSIS and
NAPOLEON C. GABRIEL,

Objectants-Appellants.

On Appeal from the United States District Court

for the Southern District of New York

BRIEF OF APPELLEES ON THE APPEALS OF MICHAEL MOUMOUSIS AND NAPOLEON C. GABRIEL FROM ORDERS DENYING THEIR MOTIONS WITH RESPECT TO THE FINAL JUDGMENT OF MAY 2, 1973 AND THE APPEAL OF NAPOLEON C. GABRIEL FROM THE ORDER OF JULY 3, 1974 GRANTING APPLICATIONS FOR FEES AND EXPENSES

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BRIEF OF APPELLEES ON THE APPEALS OF MICHAEL MOUMOUSIS AND NAPOLEON C. GABRIEL FROM ORDERS DENYING THEIR MOTIONS WITH RESPECT TO THE FINAL JUDGMENT OF MAY 2, 1973 AND THE APPEAL OF NAPOLEON C. GABRIEL FROM THE ORDER OF JULY 3, 1974 GRANTING APPLICATIONS FOR FEES AND EXPENSES

Four separate appeals are before this Court. Two are appeals from orders denying separate motions by Michael Moumousis and Napoleon C. Gabriel to set aside and modify, respectively, a final judgment approving a settlement and dismissing this action. The third is an appeal from a July 3, 1974 order allowing fees and expenses to plaintiff Allegnany

Corporation ("Alleghany") and the attorneys for plaintiffs Betty Levin and Robert LeVasseur. This appeal purports also to be an appeal from the order denying Mr. Gabriel's motion to modify the final judgment. The fourth appeal is by Jacob and June Cohen from the order allowing fees and expenses.

This brief is submitted in opposition to the appeals by Messrs. Moumousis and Gabriel from the orders denying their motions with respect to the final judgment of May 2, 1973. It is also submitted in opposition to Mr. Gabriel's appeal from the order awarding fees and expenses insofar as that appeal seeks review of the May 2, 1973 final judgment or the denial of Mr. Gabriel's motion to modify that judgment. This brief takes no position with respect to the merits of the award of fees and expenses to the extent, if any, that they are raised by the Gabriel and Cohen appeals.

Point I demonstrates a jurisdictional defect in the Gabriel appeal from the order denying his motion to modify the final judgment. Point II deals with the obvious lack of merit of these appeals. Finally, Point III establishes that the final judgment of May 2, 1973 and the denial of Mr. Gabriel's motion with respect to that judgment cannot be reviewed on appeal from the fee award.

COUNTERSTATEMENT OF THE ISSUES

A. Issues Presented on the Appeals from Orders Denying Motions With Respect to the Final Judgment of May 2, 1973.

1. Does this Court lack jurisdiction to entertain the Gabriel appeal from the order denying his motion to modify the final judgment where the notice of appeal was filed 71 days after entry of the order?

2. Was the denial of the Moumousis and Gabriel motions with respect to the final judgment improper?

B. Issues Presented on the Appeal from the Order of July 3, 1974 Granting Applications for Fees and Expenses.

1. Is the judgment of May 2, 1973 approving the settlement and dismissing the action a final judgment?

2. Can the propriety of a final judgment or the denial of a motion concerning that judgment be reviewed on appeal of a subsequent order?

COUNTERSTATEMENT OF THE CASE

A. The Background of the Litigation.

The settlement of this action embodying a recapitalization of the Missouri Pacific Railroad Company ("MoPac") and a tender offer to former Class B stockholders by Mississippi River Corporation ("Mississippi"), formerly MoPac's majority Class A stockholder, was designed to settle this litigation and a broader feud between the two classes of stockholders existing since the 1930's. The long and complex history of the stockholder dispute and of this litigation is set forth in the opinion of March 9, 1973 of Judge Edward Weinfeld approving the settlement which is reported as Levin v. Mississippi River Corp., 59 F.R.D. 353 (S.D.N.Y. 1973), aff'd on opinion below sub nom., Wesson v. Mississippi River Corp., 486 F.2d 1398 (2d Cir. 1973), cert. denied sub nom., Wesson v. Levin, 414 U.S. 1112 (1973), reh. denied, 415 U.S. 939 (1974).

The action was brought by Class B stockholders of MoPac against the railroad, its majority stockholder Mississippi and certain directors. It was a class and derivative action basically seeking increased dividends to Class B stockholders under the common law and relief for alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

Jurisdiction was founded on diversity of citizenship and Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa. (A. 179-201)

The plaintiff class was found to be a Rule 23(b)(1) and (b)(2) class by order of the District Court (Van Pelt Bryan, D.J.) on October 9, 1968 (A. 174-78).

B. The Final Judgment And Its Review.

After notice and hearing the settlement was approved by the District Court under Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure in an opinion of Judge Edward Weinfeld of March 19, 1973. Levin v. Mississippi River Corp., 59 F.R.D. 353 (S.D.N.Y. 1973), aff'd on opinion below sub nom., Wesson v. Mississippi River Corp., 486 F.2d 1398 (2d Cir. 1973), cert. denied sub nom., Wesson v. Levin, 414 U.S. 1112 (1973), reh. denied, 415 U.S. 939 (1974). Final judgment dismissing the action was entered thereon on May 2, 1973 (A. 389-91).

Mr. William R. Wesson, an objecting Class B stockholder, unsuccessfully appealed the judgment approving settlement to this Court (A. 401), sought certiorari to the Supreme Court (A. 402), and sought reconsideration of the denial of certiorari (A. 403-19). At the same time Mr. Wesson also appealed the denial of his motion to amend Judge Weinfeld's opinion approving the settlement (A. 392-400; Brief of William R. Wesson, dated June 8, 1973, Docket No. 73-1864-5, in this Court, hereinafter "Wesson Brief"). He was represented in

the Court of Appeals and the Supreme Court by the same Mr. Gerard M. Carey who now represents Messrs. Moumousis and Gabriel on the appeals that are before this Court.

In the appeal of his motion to amend Judge Weinfeld's opinion, Mr. Wesson contested the determination of the class as a Rule 23(b)(1) and (b)(2) class, not a (b)(3) class (A. 392-400, 403-18; Wesson Brief). On his appeal from the final judgment Mr. Wesson argued that plaintiff Alleghany was not a proper class representative, that the form of settlement embodying a recapitalization of MoPac was improper, that the terms of the settlement were unfair to Class B stockholders and that the Court should adopt an alternative settlement plan concocted unilaterally by Mr. Wesson (Wesson Brief). On his petition for rehearing to the Supreme Court Mr. Wesson made precisely the same arguments that have been made by Messrs. Moumousis and Gabriel in the appeals presently before the Court (A. 403-18).

C. The Consummation of the Settlement.

The settlement was conditioned on stockholder approval of the recapitalization of MoPac embodied therein (A. 219) and on Interstate Commerce Commission ("I.C.C.") approval of the issuance of securities for such recapitalization (A. 219-20). The MoPac recapitalization was over-

whelmingly approved by both classes of MoPac's stockholders (R. 213 p. 2) and the issuance of securities therefor was approved by the I.C.C. after a week-long hearing at which Mr. Carey entered an appearance and at which objecting stockholders were heard at length (A. 420-502; affidavit of Carroll E. Neesemann sworn to September 19, 1974 on motion to dismiss alleals in this Court, hereinafter "Neesemann Affidavit", ¶8). Several petitions for reconsideration by objecting stockholders, including Mr. Wesson and a Mr. James C. Gabriel, were denied by the I.C.C. (A. 513-14), and the recapitalization and the related tender offer by Mississippi were consummated on January 21, 1974 (Neesemann Affidavit ¶ 7).

D. The Moumousis and Gabriel Motions.

On November 20, 1973 Mr. Michael Moumousis filed a motion in the District Court to set aside the judgment approving the settlement (A. 1-2; A. Docket Sheets). The ground alleged for setting aside the judgment was allegedly newly discovered evidence -- the fact that Alleghany's MoPac stock was in a voting trust supposedly indicating improper representation of the class by Alleghany, a ground urged upon the I.C.C. by Mr. Wesson in his unsuccessful petition for reconsideration and upon the Supreme Court in his unsuccessful petition for rehearing. Mr. Moumousis' motion was heard on December 4, 1973 and was denied by Judge Weinfeld within hours of oral

argument by an order dated and entered the following day (A. 64-65) holding that the motion was in effect one for reargument, the Alleghany voting trust having been disclosed on the settlement hearing and even specifically referred to in the District Court's opinion approving the settlement (59 F.R.D. at 358).

Mr. Moumousis filed a notice of appeal on January 2, 1974 from the order denying his motion (A. 66-67).

On March 26, 1974 objectant Napoleon C. Gabriel moved the District Court to modify the judgment approving the settlement (A. 68-85). The primary ground alleged for modification of the judgment was the Supreme Court's decision in Zahn v. International Paper Co., 414 U.S. 291 (1973). Mr. Gabriel argued that under Zahn stockholders with interests less than the $10,000 jurisdictional amount in diversity actions should not be bound by the judgment. The alleged improper representation of the class by Alleghany and the alleged impropriety of a recapitalization form of settlement were also raised by Mr. Gabriel. This motion was denied by Judge Weinfeld's order dated and entered April 8, 1974 (A. 86). Judge Weinfeld held that the Zahn case, a diversity case concerning a Rule 23 (b)(3) class action, was not applicable to this case which is a Rule 23(b)(1) and (b)(2) class action for dividends and is grounded on jurisdiction under Section 27 of the Exchange Act, which requires no minimum amount in

controversy, as well as upon diversity of citizenship. Judge Weinfeld also noted that the Zahn argument had been unsuccessfully made to the Supreme Court on petition for rehearing.

Mr. Gabriel's notice of appeal from the order entered on April 8, 1974 denying his motion was filed 71 days later on June 18, 1974 (A. 87-89; A. Docket Sheets; Neesemann Affidavit ¶ 12, Ex. P).

On August 27, 1974 Messrs. Moumousis and Gabriel moved this Court for an extension of the time to docket their appeals (Neesemann Affidavit ¶ 13). This motion was granted by order of this Court, filed August 27, 1974 (A. 564) "without prejudice to appellees' rights to move to dismiss, etc." A motion of appellees to dismiss these appeals (Appellees' Notice of Motion, dated September 19, 1974, to dismiss appeals of Moumousis and Gabriel in this Court; Neesemann Affidavit) was denied by this Court on October 15, 1974.

E. The Award of Attorneys' Fees and Expenses.

After the termination of Mr. Wesson's unsuccessful appeal from the final judgment of May 2, 1973 and after stockholder and I.C.C. approval and consummation of the re-capitalization and tender offer, plaintiff Alleghany and the attorneys for plaintiffs Betty Levin and Robert LeVasseur moved the District Court for an award of attorneys' fees and

expenses (A. 90-145). Alleghany's application was granted in full and the application of the attorneys for the other plaintiffs was granted in part (A. 165-71). An order directing defendants MoPac and Mississippi to pay such fees and expenses as had been approved was entered on July 3, 1974 (A. 172-73).

Mr. Gabriel filed a notice of appeal from that order on July 23, 1974 (A. Docket Sheets; R. 225). The order was also appealed on August 1, 1974 by former Class A stockholders Jacob and June Cohen (A. Docket Sheets; R. 226).

ARGUMENT

I. THE GABRIEL APPEAL FROM THE ORDER DENYING HIS MOTION IS JURISDICTIONALLY DEFECTIVE.

Because of the late filing of his notice of appeal this Court lacks jurisdiction to entertain Mr. Gabriel's appeal from the denial of his motion. The order denying his motion was filed on April 8, 1974 (A. 86; A. Docket Sheets; Neesemann Affidavit ¶ 12). His notice of appeal was not filed until June 18, 1974 -- 71 days later (A. 87-89; A. Docket Sheets; Neesemann Affidavit ¶ 12, Ex. P). Hence, the notice of appeal was not filed within the 30-day period provided in Rule 4(a) of the Federal Rules of Appellate Procedure, nor was it filed within the further period, not to exceed 30 days, allowed by the Rule for cases of excusable neglect. Indeed, no request

for such an extension was made. Mr. Gabriel's failure to file a timely notice of appeal deprives this Court of jurisdiction. Guido v. Ball, 367 F.2d 882 (2d Cir. 1966); 9 Moore's Federal Practice ¶ 204.02, at 906-07.

II. THE DISTRICT COURT PROPERLY DENIED THE MOUMOUSIS AND GABRIEL MOTIONS WITH RESPECT TO THE FINAL JUDGMENT.

On the Moumousis and Gabriel motions to set aside and modify the final judgment of May 2, 1973 counsel for Messrs. Moumousis and Gabriel failed to specify the statute or rule under which relief was being sought in the motions (A. 1-22, 68-74). The only mechanism available, however, for the type of relief sought is a motion under Rule 60(b) of the Federal Rules of Civil Procedure for "Relief From Judgment or Order". These motions should therefore be treated as motions under Rule 60(b). The only provisions of Rule 60(b) that could even arguably apply to these motions are Rule 60(b)(1) "mistake . . . "; and Rule 60(b)(2): "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

A. The Alleghany Voting Trust Was Not Newly Discovered Evidence.

The "newly discovered evidence" alleged by Mr. Moumousis and Mr. Gabriel as grounds for setting aside or modifying the judgment under Rule 60(b)(2) of the Federal

Rules of Civil Procedure was the fact that Alleghany's MoPac stock was subject to a voting trust, a fact allegedly disqualifying Alleghany from representing Class B stockholders. This fact had been adverted to in the proceedings on approval of the settlement (e.g., A. 250, 272; R. 213 pp. 2-7) at which the voting trustee Franklin National Bank had formally appeared (A. 250). The voting trust was also specifically referred to in Judge Weinfeld's opinion approving the settlement (59 F.R.D. at 358).

In denying Mr. Moumousis' motion Judge Weinfeld stated:

> "That the Alleghany stock was subject to a voting trust was known to the Court. It was specifically referred to in the Court's opinion and also alluded to by counsel representing stockholders at the hearing on the settlement proposal and in briefs and affidavits submitted with respect thereto." (A. 65)

And in approving the settlement Judge Weinfeld had also found that:

> "The other two plaintiffs, minority Class B stockholders, each also owns a substantial number of shares reflecting a heavy investment in the stock. Their counsel have acted independently of Alleghany's counsel in representing the interests of the Class B minority shareholders." 59 F.R.D. at 366-67.

This very same contention as to the alleged disqualifying effect of Alleghany's voting trust had also been raised and rejected in Mr. Wesson's petitions for reconsideration before the I.C.C. (A. 506-07) and for rehearing before the Supreme Court (A. 411-13).

B. The Failure of the Objectants to Cite the Zahn Case (which, in any case, is inapposite) on the Settlement Hearing Is Not Grounds for Setting Aside or Modifying the Final Judgment.

The principal contention made by Mr. Gabriel in his motion to modify the final judgment (A. 70-71) was that Zahn v. International Paper Co., 414 U.S. 291 (1973), should be applied to the action to deprive the judgment of binding effect on stockholders with individual interests smaller than the $10,000 jurisdictional amount in controversy required for diversity jurisdiction. This argument was also made by Mr. Wesson before the Supreme Court in his unsuccessful petition for rehearing (A. 409-10) and before the I.C.C. in his unsuccessful petition for reconsideration (A. 503-06).

The Supreme Court's decision in the Zahn case was certainly not newly discovered evidence, nor did it constitute a mistake of the Court due to a change in the law of this Circuit. See Tarkington v. U.S. Lines Co., 222 F.2d 358 (2d Cir. 1955). In Zahn the Supreme Court merely affirmed the decision rendered by this Court in September 1972 (469 F.2d 1033), months before the January 25, 1973 hearing before Judge Weinfeld on the settlement (A. 245-366), Judge Weinfeld's March 19, 1973 opinion approving the settlement (59 F.R.D. 353) and the May 2, 1973 final judgment dismissing the action (A. 389-91). Certainly, the failure of the objectants to cite the Zahn decision to Judge Weinfeld before he approved the settlement is not a valid ground for modifying the final judgment.

In any case, the inapplicability of the Zahn case involving a Rule 23(b)(3) class action founded on diversity jurisdiction to a Rule 23(b)(1) and (b)(2) class action for dividends also jurisdictionally founded on Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1970), which requires no minimum amount in controversy, is obvious. Appellants simply misconstrue this action as a Rule 23 (b)(3) or "spurious" class action (see Appellants' Brief p. 13), but, to the contrary, the claims of the class members herein were joint, not separate and distinct as in a "spurious" class. In a suit for dividends all members of the class obviously must be treated the same. Doherty v. Mutual Warehouse Co., 245 F.2d 609, 612 (5th Cir. 1957).

Moreover, the class herein was found to be a Rule 23(b)(1) and (b)(2) class and not a (b)(3) class by Judge Bryan in his order of October 9, 1968 (A. 174-78). That determination was enforced by the final judgment of May 2, 1973 which bound all Class B stockholders. In a motion by Mr. Wesson to amend Judge Weinfeld's March 19, 1973 opinion approving the settlement, the denial of which he unsuccessfully appealed with his appeal of the May 2, 1973 final judgment, the propriety of the class determination enforced by the May 2, 1973 final judgment was fully litigated (A. 392-400, 403-18; Wesson Brief; Appellees' Brief in this Court in opposition to Wesson appeals, Docket No. 73-1864-5, hereinafter "Appellees' Brief (1973)", pp. 24-27; Wesson Petition for Certiorari, dated October 17, 1973, Docket No. 73-663, in the Supreme Court,

hereinafter "Wesson Petition for Certiorari", p. 4). The propriety of the initial class determination and of the final judgment enforcing it is not reviewable on appeal from denial of a Rule 60(b) motion where only the propriety of the denial of Rule 60(b) relief on a specific Rule 60(b) ground is subject to review:

> "An appeal from a denial of the 60(b) motion brings up for review only the correctness of that order, and does not bring up for review the final judgment." 7 Moore's Federal Practice ¶ 60.29, at 414-15 (footnote omitted); see Saenz v. Kennedy, 178 F.2d 417 (5th Cir. 1950).

C. The Propriety of the Form of Settlement Approved by the District Court and Affirmed on Appeal Cannot Properly Be Relitigated by Motion to Modify the Final Judgment.

Mr. Gabriel's motion to modify the final judgment (A. 72) raised as a ground for modifying that final judgment the alleged impropriety of a settlement embodying a recapitalization of the defendant corporation. This argument was made at the settlement hearing and specifically rejected by Judge Weinfeld in his opinion approving the settlement. (59 F.R.D. at 367 n. 38) It was argued before this Court on the Wesson appeal from the final judgment of May 2, 1973 (A. 395; Wesson Brief pp. 5-9, 11-13; Appellees' Brief (1973), pp. 19-24), and before the Supreme Court on the Wesson petition for certiorari (A. 414-15; Wesson Petition for Certiorari, pp. 5-6). The issue was therefore not appropriate for relief under

Rule 60(b), and only the propriety of the denial of Mr. Gabriel's Rule 60(b) motion and not the propriety of the final judgment of May 2, 1973 can be reviewed on appeal from the denial of the motion.

III. THE APPEAL FROM THE FEE AWARD DOES NOT RAISE FOR REVIEW THE FINAL JUDGMENT OR THE PROPRIETY OF THE DISTRICT COURT'S DECISIONS ON THE MOTIONS.

Appellant Gabriel, by appealing from the fee award of July 3, 1974 has sought review of

> "all prior orders and decisions of [the District] court upon which said judgment [the fee award] was based, including, in particular, the denial by the Court below on April 8, 1974, of Gabriel's motion, dated February 2, 1974, to be relieved of the District Court's judgment of May 2, 1973, approving the settlement of the class suit below" (Appellants' Brief p. 1).

It is clear from Points III and V of Appellants' Brief that Messrs. Moumousis and Gabriel (or at least Mr. Gabriel who, unlike Mr. Moumousis, appealed from the fee award) seek review of the final judgment of May 2, 1973 approving the settlement and dismissing the action (Appellants' Brief pp. 14, 18). As shown below the appeal from the fee award cannot afford appellants an opportunity to relitigate the motions or the approval of the settlement.

A. The May 2, 1973 Judgment was Final.

In the May 2, 1973 judgment approving the settlement and dismissing the action the District Court retained

jurisdiction only of

> "all matters respecting the consummation of the settlement of this action pursuant to the Stipulation of Settlement and for the purpose of entertaining applications for attorneys' fees and expenses by counsel for plaintiffs Betty Levin and Robert LeVasseur and by plaintiff Alleghany Corporation." (A. 391)

The July 3, 1974 order was entered on such applications for fees and expenses (A. 165-73).

The May 2, 1973 judgment ended the litigation on the merits and left only matters of execution yet to be accomplished. It was therefore a "final judgment" in any sense of the term. See Catlin v. United States, 324 U.S. 229 (1945). Nor is the finality of the judgment affected by the pendency of applications for fees and expenses. To be final a judgment does not have to dispose of all matters involved in an action:

> "Because one phase of the litigation was left unsettled and in that sense the judgment is interlocutory does not preclude the holding that the judgment is res adjudicata as to that phase which has been finally concluded." Tuolumne Gold Dredging Corp. v. Walter W. Johnson Co., 71 F. Supp. 111, 113 (N.D. Cal. 1947); see Zdanok v. Glidden Co., 327 F.2d 944, 953-55 (2d Cir.), cert. denied, 377 U.S. 934 (1964); Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962).

The finality of the May 2, 1973 judgment was recognized by Judge Weinfeld who labelled it a "Final Judgment and Order" (A. 389). And the bringing of the Moumousis and Gabriel motions for relief from the judgment constitutes

recognition of the finality of the judgment, since Rule 60(b) relief is available only from a final judgment or order:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons. . . ." Fed. R. Civ. P. 60(b) (emphasis added); see Madden v. Perry, 264 F.2d 169, 175 (7th Cir. 1959); 7 Moore's Federal Practice ¶ 60.20, at 242-44.

Nor was the finality of the judgment affected by the pendency of motions, as appellants seem to contend. A motion for relief under Rule 60(b) does not affect the finality of the judgment. The Rule itself states:

> "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

B. The Principles of Res Judicata and Law of the Case Preclude Relitigation of the Issues Sought To Be Raised on the Appeal from the Fee Award.

On Mr. Wesson's appeal from the final judgment of May 2, 1973, the judgment was affirmed by this Court on the opinion below (486 F.2d 1398). The United States Supreme Court denied certiorari (414 U.S. 1112) and denied a petition for rehearing (415 U.S. 939). A final judgment, affirmed on appeal, has conclusive effect and is res judicata on any grounds which were raised or might have been raised before the appellate court. Sunshine Coal Co. v. Adkins, 310 U.S. 381, 402-03 (1940); Miller v. National City Bank, 166 F.2d

723, 726 (2d Cir. 1948); 1B Moore's Federal Practice ¶ 0.405, at 624 and cases cited therein. Neither Mr. Moumousis nor Mr. Gabriel has raised any evidence that is truly "newly discovered", and all of the arguments made in their motions and on this appeal were made or could have been made at the settlement hearing. The May 2, 1973 final judgment is therefore res judicata of all of these issues.

The rationale of the doctrine of res judicata, to bring an end to litigation within a reasonable time, is graphically illustrated in this case. On the basis of the final judgment of May 2, 1973 approving the proposed settlement, after the unsuccessful appeal of Mr. Wesson had run its course, the settlement was effected in January 1974 with a recapitalization of MoPac (involving the issuance of new securities) and a tender offer by Mississippi (Neesemann Affidavit ¶ 7). Obviously appellants cannot be treated differently from other former MoPac Class B stockholders, and it would work grave injustice on the overwhelming majority of both Class A stockholders and Class B stockholders who approved the recapitalization (R. 213, p. 2) to permit appellants to undo this settlement which took years to negotiate and effect.

Even assuming arguendo that the judgment of May 2, 1973 was not final, under the doctrine of "law of the case" the result should be the same, and appellants should not be

permitted to relitigate the issues sought to be raised by the appeal from the fee award.

The doctrine of "law of the case" precludes relitigation in the same case, of all issues decided by appellate courts, either expressly or by necessary implication, on appeal from an interlocutory judgment or order. Consumers Union of U.S. Inc. v. Veterans Administration, 436 F.2d 1363 (2d Cir. 1971); Zdanok v. Glidden Co., 327 F.2d 944, 951-53 (2d Cir.), cert. denied, 377 U.S. 934 (1964).

The Wesson appeals from Judge Weinfeld's May 2, 1973 judgment and his order denying the motion to amend the March 19, 1973 opinion approving the settlement, raised all of the issues sought to be raised by the appeals now before this Court. On these appeals Mr. Wesson unsuccessfully argued that Alleghany was not a proper class representative (Wesson Brief), that the determination below that the class was a Rule 23(b)(1) and (b)(2) class and not a (b)(3) class was incorrect (A. 382-400, 403-18; Wesson Brief), that the form of settlement embodying a recapitalization was improper (A. 395-97; Wesson Brief), that the terms of settlement were unfair and that the Court should adopt an alternative plan for settlement (Wesson Brief). On his petition for rehearing before the Supreme Court Mr. Wesson made the specific Alleghany voting trust and Zahn arguments made here (A. 409-14).

Unlike the doctrine of res judicata, application of the doctrine of law of the case is discretionary with the Court, but it has been long established that "the power to re-examine questions previously determined should be sparingly exercised." Johnson v. Cadillac Motor Co., 261 F. 878 (2d Cir. 1919). The doctrine is addressed, in Judge Friendly's words, to the "good sense" of the Court, Uniformed S.M. Ass'n v. Commissioner of Sanitation of City of New York, 426 F.2d 619, 628 (2d Cir. 1970), cert. denied, 406 U.S. 961 (1971), and is generally followed unless application would work a "manifest injustice", White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967). Here it is obvious that manifest injustice would result if these two dissatisfied stockholders should be permitted to force their will upon the thousands of other MoPac stockholders who approved the settlement.

CONCLUSION

For the foregoing reasons, the orders of the District Court should be affirmed.

Respectfully submitted,

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October 23, 1974

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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BETTY LEVIN, et al., :

Plaintiffs-Appellees, :

-against- :

MISSISSIPPI RIVER CORPORATION, et al., : Docket No. 74-2104

Defendants-Appellees, :

MICHAEL MOUMOUSIS and NAPOLEON C. GABRIEL, :

Objectants-Appellants. :

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DOROTHY M. SCHLIP, being duly sworn, deposes and says that she is over the age of twenty-one years; that she is employed by the firm of Sullivan & Cromwell, attorneys for Defendants-Appellees; that on the 23rd day of October, 1974 she served the within brief upon Gerard M. Carey, Esq. by depositing two true copies of the same securely enclosed in a postpaid wrapper in the Post-Office Box regularly maintained by the United States Government at 48 Wall Street, Borough of Manhattan, City and State of New York, directed to said Gerard M. Carey, Esq. at 617 Third Street,

Brooklyn, N.Y. and two copies on William Heimowitz, Esq., at 535 Fifth Avenue, New York, N.Y. 10017 those being the addresses within the state designated by them for that purpose upon the preceding papers in this action.

Dorothy M. Schlip

Sworn to before me this
23rd day of October, 1974

George A. Scholze
Notary Public

GEORGE A. SCHOLZE
Notary Public, State of New York
Residing in Nassau County
Nassau Co. Clk's No. 30-3526250
Certificate Filed in
New York Co. Clk's Office
Commission Expires March 30, 1975